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Supreme Court, U.S.
FILED
APR 20 1998
CLERK

No. 97-1216

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

JAMES B. DOWD
AND ALL SIMILARLY SITUATED
DISABLED VETERANS-PETITIONERS
VS
JAMES F. HINCHMAN,
ACTING COMPTROLLER GENERAL
OF THE UNITED STATES OF AMERICA,
UNITED STATES GENERAL ACCOUNTING OFFICE
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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18 pp

ADDITIONAL ISSUES PRESENTED BY THE OPPOSITION BRIEF OF THE UNITED STATES:

IV. WHETHER, AS A MATTER OF CONSTITUTIONAL LAW, IT IS IMPOSSIBLE TO BE UNTIMELY IN RAISING CONSTITUTIONAL DUE PROCESS AND/OR EQUAL PROTECTION OF THE LAW ISSUES TO A QUASI-JUDICIAL ADMINISTRATIVE BOARD CREATED BY ACT OF CONGRESS (WHICH BY DEFINITION HAD NO JURISDICTION TO DECIDE OR GRANT RELIEF AS TO THOSE ISSUES)?

V. WHETHER THE RIGHTS OF THE CLASS OF DISABLED VETERANS TO EQUAL EMPLOYMENT AND MEASUREMENT OF THEIR RELATIVE STATUS WAS REQUIRED BY GAO REGULATIONS AND HISTORICALLY BASED UPON FEDERAL VETERANS PREFERENCE LAWS; THAT BODY OF LAW DOES NOT REQUIRE PROOF OF "UNDERREPRESENTATION" TO VEST THE DAVS' RIGHTS SET BY CONGRESS; BUT EVEN IF THIS IS A REQUIREMENT OF THE LAW THE DAV'S PROVED THAT "UNDERREPRESENTATION" AS MEASURED BY THE CORRECT STANDARDS, THE FEDERAL WORKFORCE EMPLOYMENT PERCENTAGE OR INTERNAL COMPARISON TO ALL OTHER GROUPS; THE NATIONAL LABOR FORCE STANDARD, THE ONE USED AS A COMPARISON YARDSTICK BY THE ADMINISTRATIVE BOARD, AFFIRMED BY THE FEDERAL APPEALS COURT, IS AN INCORRECT BASELINE FOR MEASUREMENT OF FEDERAL VETERAN EMPLOYEES?

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REPLY TO BRIEF IN OPPOSITION

The Opposition Brief of the United States erroneously argues:

1. That the DAVs were untimely in bringing Constitutional Issues to the Attention of the Administrative Board (the Board or the PAB) and in demanding relief for perceived violations of the Constitution. No mention was made by the United States of the fact that as a congressionally created quasi-judicial board the Board had **no jurisdiction** to decide or grant relief as to constitutional issues.

2. That the United States Government Accounting Office (GAO) has no statutory or other obligation to its Veterans, and specifically no obligation to this Disabled Veteran Class (DAVs) to treat them equally under the law. In addition, GAO does not have to ensure equal treatment for DAVs by measuring comparative advancements on an annual basis.

3. That, in order to grant relief for damages for failure to promote equally, the class of disabled veterans must necessarily prove that they were "underrepresented" at GAO.

4. That the class never proved "underrepresentation" of DAVs at GAO, and no "underrepresentation" ever existed, which representation is directly refuted by stipulated facts of record.

5. That the DAVs never met the legal standards for class action proof of "damages".

REPLY ARGUMENT

AS AN OVERALL MATTER, THE POSITION OF THE UNITED STATES IS LEGALLY UNSOUND AND FACTUALLY FALSE:

AS A MATTER OF BASIC CONSTITUTIONAL LAW, IT IS IMPOSSIBLE TO BE UNTIMELY IN RAISING CONSTITUTIONAL DUE PROCESS AND/OR EQUAL PROTECTION OF THE LAW ISSUES TO A QUASI-JUDICIAL ADMINISTRATIVE BOARD CREATED BY ACT OF CONGRESS (WHICH BOARD BY DEFINITION HAD NO

JURISDICTION TO DECIDE OR GRANT RELIEF AS TO CONSTITUTIONAL ISSUES); NEVERTHELESS THE DAVS TIMELY RAISED THOSE ISSUES WITH THE BOARD:

A. It was Impossible For The DAV's To Have Been Untimely In Raising Constitutional Issues Before the Administrative Board:

The United States opening statement in its opposition brief is legally incorrect as to the law applicable to the purported timeliness requirement, where the purported requirement was to bring constitutional issues to an administrative board. As a Congressionally created Administrative Board[1], it had no authority to grant relief on constitutional issues. Therefore, it was improper to require the class to perform a useless act, i.e., filing constitutional complaints with an administrative board having no jurisdiction over such issues and having no power to grant the relief requested.

B. Nevertheless, The DAVs Properly And Timely Raised Objections to The Conflicts of Interest Of the PAB and the Improper Redress Procedure Which Violated Constitutional Due Process (Amendment V) and Equal Protection of the Laws (Amendment XIV) For The DAVs:

Despite the lack of any such requirement, the DAVs

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[1] The office of the Comptroller General was created in 1789 as part of the Department of the Treasury and transferred to GAO when it was created in 1921. All of its employees were part of the Executive Branch personnel system with all of the veterans rights applicable to them equally as with the Executive Branch employees. Dowd, the class representative, was hired by GAO in the 1970s as were most of the class members. The PAB was created by Congress when it passed the GAO Personnel Act, effective October 1, 1980. GAO employees continued to enjoy all of the same rights and benefits of the Executive Branch. Order # 2306.1 was one of several Orders GAO issued effective October 1, 1980 to ensure those rights and benefits would continue.

properly and timely raised constitutional issues to the Board at the very first opportunity.

The DAVs did this by written objections to the procedures followed by the Administrative Law Judge and by objecting to the blatant conflict of interest of the board in deciding issues involving the Board's own failure to perform its oversight function, to ensure that GAO followed all of the provisions of law and GAO Orders and take corrective action when necessary to conform to Orders and Regulations.

While a case is pending before an administrative agency, even on a motion for reconsideration, the motion to expand the scope of relief is timely, Stone v. I.N.S., 115 S.Ct 1537, 1542 (1995); Outland v. CAB, 284 F. 2d 224, 227 (D.C. Cir. 1960)(an action and facts contained in proceedings for reconsideration are still properly before the Administrative Agency-and non-final). It follows that the Federal Circuit erred in failing to address the constitutional issues then before it on appeal.

It was therefore error for the PAB to hear or decide any part of the case. It should have recused itself as the Class requested.

C. The Classes' Objection and Request for Recusal of the Board and the ALJ Was Properly Founded In Law:

The class requested an independent agency be appointed to hear the case, as per the procedure used in Greenhaw v. Lubbock County Beverage Assn, 721 F2d 1019, 1025 (5th Cir 1983), rehg denied, 726 F2d 752 (1984); Bogosian v. Gulf Oil Corp. 561 F2d 434 (3rd Cir 1977), Cert den, 434 US 1086 (1978) be appointed to determine the extent of damages because of the inherent conflict of interest of the Board. That request was not just appropriate, but the conflict of interest situation required it to maintain the independence of the fact finding quasi-judicial forum. The Board and the Federal Circuit erred in denying that entirely proper request.

Thus, the statement that "Petitioners constitutional claim[s] was (sic) not presented to the Board or addressed by the court of appeals." (Op. Br. Pg. 6) is simply false as a matter of both law and fact.

Certiorari should be granted to review this issue.

THE RIGHTS OF THE CLASS OF DISABLED VETERANS TO EQUAL EMPLOYMENT AND MEASUREMENT OF THEIR RELATIVE STATUS WAS REQUIRED BY GAO REGULATIONS AND HISTORICALLY BASED UPON FEDERAL VETERANS PREFERENCE LAWS; THAT BODY OF LAW DOES NOT REQUIRE PROOF OF "UNDERREPRESENTATION" TO VEST THE DAVS' RIGHTS SET BY CONGRESS; BUT EVEN IF THIS IS A REQUIREMENT OF THE LAW THE DAV'S PROVED THAT "UNDERREPRESENTATION" AS MEASURED BY THE CORRECT STANDARDS, THE FEDERAL WORKFORCE EMPLOYMENT PERCENTAGE OR BY INTERNAL COMPARISON TO ALL OTHER GROUPS; THE NATIONAL LABOR FORCE STANDARD, THE ONE USED AS A COMPARISON YARDSTICK BY THE ADMINISTRATIVE BOARD, AFFIRMED BY THE FEDERAL APPEALS COURT, IS AN INCORRECT BASELINE FOR MEASUREMENT OF FEDERAL VETERAN EMPLOYEES:

The United States argues at Op. Br. Pg. 7 the proposition (upon which the entire opposition is founded) that Petitioners do not take issue with the

> factual finding that they failed to show that disabled veterans were underrepresented at GAO in grades GS 7-15, or with the conclusion that they must make such a showing of underrepresentation before goals and timetables could be used.

This assertion, is false! The thrust of Petitioners' brief focuses on competitive advancements i.e. GS-12 through SES.

The legal proposition argued by GAO that **after** finding liability for the failure of GAO to carry out its duties under Order # 2306.1, some additional prerequisite ("underrepresentation") to make those duties binding sufficiently to support relief is illogical, legally outrageous and factually not

supported in the record. No cites to case law or evidence are given for this false conclusion except the clearly erroneous conclusion of the ALJ which itself was unsupported by any evidence at all except the use of the wrong standard referenced above.

The following are six (6) reasons demonstrating the errors of law and resulting invalid conclusions in the United States position.

1. The United States Cites No Authority In GAO's Regulations, Nor Does Any Exist In Any Statute, or Case Law, Supporting The Legal Theory That The DAVs Must First Prove "underrepresentation" To Receive the Veterans Benefits Promised Them By Congress and GAO's Order # 2306.1; This is Simply Because None Exists:

Nowhere in the body of GAO Order # 2306.1 (See Petitioner's Brief in chief page 8-9 for relevant text) does any mention of the word or concept of proof of "underrepresentation" exist. The rights of DAVs to be measured and to receive equal treatment including "a full measure of advancements" is stated as an imperative right. When that did not happen, and the fact that it did not happen for 11+ years is undisputed, summary judgment was proper and was granted.

No authority except the hiring policy of GAO applicable only to non-veteran minorities and women is cited[2] for the main proposition that "underrepresentation" must first be found to trigger the enforcement of the DAVs vested rights to equality of treatment at their place of Federal Employment. (As to "underrepresentation" in the higher G/S grades see chart 1, page 18 Petitioners Brief for comparison by GS grades of

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[2] Neither the ALJ's, nor the full board's, nor the Federal Circuit's opinions cited any authority at all for the erroneous legal proposition that the DAVs had to prove "underrepresentation" before being entitled to injunctive relief to place them in the position of equality in promotions. They simply created that concept and applied it to deny the relief to which the DAVs were entitled.

promotions).

2. The PAB erred in applying a Hiring Standard to Equal Promotion Rights To Which The DAVs Were Vested By Act Of Congress and Their Employment Contracts With GAO:

The definition at GAO the term of art "Underrepresentation" applies to hiring of Title VII "Preferred Gender And Race Classes" developed Five (5) years After the Veterans rights To equal treatment were codified at GAO; that definition is illogical in the context of this case and inapplicable to equal promotion rights vested at the time of hiring incident to the veterans' preference laws.

In accordance with the GAO Personnel Act of 1980, at 4 C.F.R. § 2.6 Veterans Preference

> (a) **GAO will** provide preference, for any individual who would be a preference eligible in the Executive Branch, in a manner and to an extent consistent with preference eligibles **in the Executive Branch.**

3. The Standard of Comparison, i.e., the "Baseline", used by the ALJ in calculating "underrepresentation" was wrong as a matter of law:

The baseline from which the determination of "no underrepresentation" of DAVs at GAO was erroneous, as a matter of law. The ALJ and the Board compared GAO's DAV percentage to the **National Labor Force** percentages, rather than the proper standard, the percentage of DAV employment in the **Federal Labor Force.** GAO is a Federal Employer. Stipulated statistics proved that the Federal Government employed from five to seven times more DAVs than the civilian workforce, the wrong standard used. Statistics were admitted to evidence from The Federal Government's Office of Personnel Management's (OPM) Annual Reports to Congress, "Veterans' Employment In The Federal Government" for the fiscal year 1991.

4. Had The Proper Yardstick (The Federal Government Workforce) Been Used, The Statistical Result Would Clearly Demonstrate "Underrepresentation":

Statistics [3] summarized in the foregoing report (page one) demonstrate that the Federal Government, as compared to other sectors of the National Labor Force (the wrong yardstick used by the ALJ and thereafter accepted as gospel truth) by the full Board and the Circuit Court, was erroneous by a factor of five to seven times. For that reason, the GAO could not, without making false statements to this Court or the Court of Appeals, have given references to any statistics of record or evidence which supports the clearly erroneous and biased conclusion of the ALJ, which was relied upon by the full Board and the Appeals court. This is because none exist. No evidentiary support for this false proposition was ever offered by GAO. This fact alone makes the conclusion of law that there was "no underrepresentation" erroneous because of use of a standard of measure which was wrong by a factor of between 500 percent to 700 percent.

As a factual matter the DAVs were "underrepresented" all levels at GAO for the entire 11+ year period.

The overall Federal Government average of employment of DAVs was 5.5%, GAO however, at the time the evidence was gathered for this case, employed only 1.9 % of DAVs as compared to a government average of 5.5%. The extent of the underrepresentation continued to increase over the time frame of litigation of this case.

The evidence cited by the Class was government wide statistics presented by the DAVs and internal statistics for all other GAO groups. Those figures were accepted by the GAO as correct. The fact is, by any fair standard of measurement, DAVs at GAO were "underrepresented" in all Government Service levels.

Thus, even if the erroneous methodology of requiring some "trigger" of "underrepresentation" is used, GAO's DAVs met it.

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[3] References to record contained in Petitioners Federal Circuit brief Pg. 14, detailed cites omitted

5. Other Evidence Of Actual "Underrepresentation" Is Also Undisputed:

Incident to the formal approval of the six years of affirmative action plans which were hidden for a large part of this case, the Comptroller General, the head of GAO, found that there was underutilization and underrepresentation of DAVs. Moreover, the bottom line is that when the case started about 300 DAVs were at GAO, only about 40 remain at GAO now.

6. To Retroactively Take The DAVs Vested Rights Violates the Principles of Winstar, infra:

Each and every class member, at the time of his/her employment contract at GAO[4] was informed of those rights and thereafter was entitled to those vested benefits. As a historically vested right, codified at GAO as regulation 4 C.F.R. 2.6 (a), and GAO Order # 2306.1 each employee had the right to rely upon the regulation and policy and practice to which he/she were entitled as a disabled veteran. To, after the fact of vesting, take away those rights of the DAVs who had those preference rights violates the principles of United States V. Winstar Corp., et al, 518 U.S. ___, 116 S.Ct. 2432 (1996), 135 L Ed 2d 964 (July 1, 1996)(The benefits of contracts entered into by the United States can not be retroactively modified or taken away by unilateral action of the government). That is precisely what happened in this case.

THE DAVs PROVED "DAMAGES" AND ENTITLEMENT TO INJUNCTIVE RELIEF-MEASUREMENT BY GAO ON AN ANNUAL BASIS OF THEIR COMPARATIVE STATISTICAL STATUS VIS A VIE OTHER COMPETING GROUPS AT GAO FOR PROMOTIONS:

Each and every GAO official who testified, stated that

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[4] The great majority of the DAVs were hired when GAO employees were a part of the Executive Branch personnel system. The DAV's rights vested by virtue of their employment contract at the time they were hired and thereafter confirmed when GAO wrote and adopted Order # 2306.1, on October 1, 1980.

the provisions of Order # 2306.1, if followed, "had monetary value" in terms of advancement and promotions. The DAV's expert witness, Dr. Lurito quantified that damage, and the GAO's expert Dr. Baker admitted that Lurito's methodology and calculations were correct. Material damages resulted from the fact of non-promotion of the DAVs. No contrary evidence appears anywhere in the record. Thus, but for the erroneous finding of a legal requirement of an "underrepresentation" threshold for relief, this case would be over.

The class presented proof to the Board and the ALJ that met all acceptable standards for proof of damages on an aggregate basis for a class. The average loss of earnings by the DAVs in comparison to each of the preferred classes and GAO as a whole was computed using stipulated statistics as per General Tel Co v. Falcon, 457 US 147 (1982) and Bowe v Colgate-Palmolive Co., 489 F2d 896, 902 (7th Cir 1973). The class followed that process in accordance with generally applicable class action proof standards as set out in Story Parchment Co. v. Paterson Paper Co., 282 US 555, 563 (1931) where the court held:

> In such case, while the damages may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate.

The ruling of the PAB, affirmed by the Federal Circuit, improperly shifted the burden of proof of liability once summary judgment for liability had been found and violated the "clear and convincing evidence standard" placed upon the defendant after summary judgment as to liability has been found, and is thus plain error of law. Johnson v. Goodyear, 491 F2d 1364, 1380 (5th Cir 1974).**AGGREGATE DAMAGE CALCULATIONS ARE APPROPRIATE IN CLASS ACTION CASES WHERE (AS HERE) SUMMARY JUDGMENT HAS BEEN GRANTED:**

This Court held in Boeing Co v Van Gemert, 444 US 472 (1980) that aggregate monetary liability calculations are

appropriate and has recognized and approved this concept, followed here, in other contexts Illinois v Abbott & Assocs, 460 US 557 (1983); Chmieleske v City Prod Corp, 71 FRD 118, 160-162 (WD Mo 1976). In the context of employment discrimination cases, this Court has approved the very procedure followed by the class in this case. Cooper v Federal Reserve Bank, 467 US 867 (1984).

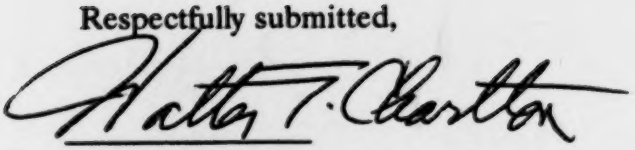
CONCLUSION

In this case, the GAO by its unconstitutional preference of a classes of employees based upon gender and race under the guise of Title VII affirmative action, contravened the vested rights of the Disabled Veterans, a gender and race neutral class, to at least be treated equally. That action violated the equal protection of the law clause of the Fourteenth Amendment to the Constitution contrary to the teachings of this Court in Adarand Constr., Inc. v. Pena, 515 U.S. 200 (1995).

Once Summary Judgment had been rendered, the administrative judicial process as applied was faulty. As applied it violated the concept of equal treatment of the laws and due process. Multiple objections made while that process was continuing. Those objections were entirely timely and thus properly before the Court of Appeals. The petition should be granted to review that faulty procedure which violates so clearly equal treatment for all citizens, and certainly applies equally forcefully to our war heroes.

For the foregoing reasons, certiorari should be granted.

Respectfully submitted,



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